

**PERMINTEX JSK RESOURCES SDN BHD v.
FOLLITILE (M) SDN BHD & ANOTHER CASE**

HIGH COURT MALAYA, KUALA LUMPUR

LEE SWEE SENG J

[ORIGINATING SUMMONS NO: WA-24C-117-10-2016

& WA-24C-105-10-2016]

28 FEBRUARY 2017

CONSTRUCTION LAW: *Adjudication – Setting aside – Application to set aside decision of adjudicator – Grounds of – Right of claimant to bring adjudication proceedings – Whether consent of respondent to adjudication necessary – Whether appointment of adjudicator according to procedure – Whether respondent received direction from adjudicator on amount of fees to be deposited with Kuala Lumpur Regional Centre for Arbitration – Whether there was breach of natural justice*

Permintex JSK Resources Sdn Bhd ('respondent') appointed Follitile (M) Sdn Bhd ('claimant') as its subcontractor for a construction project. The claimant was not paid the balance sum for the works done by the respondent. The claimant then proceeded to serve a payment claim on the respondent pursuant to s. 5 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'). Since there was no payment response by the respondent, the claimant brought adjudication proceedings against the respondent and an adjudicator was appointed by the Kuala Lumpur Regional Centre for Arbitration ('KLRCA') to resolve the dispute. In the absence of an adjudication response, the adjudicator awarded a sum of RM262,018.62 ('adjudication decision') to the claimant. The respondent applied to set aside the adjudication decision under s. 15(b) of the CIPAA on grounds, *inter alia*, that (i) there was denial of natural justice; (ii) the respondent was not agreeable to the matter being referred to in the adjudication proceeding and the matter be referred to the civil court for litigation; and (iii) the respondent had not received any direction from the adjudicator on the amount of fees they should deposit with KLRCA. In the meantime, there was also a corresponding application by the claimant to enforce the adjudication decision as if it was a judgment of the court.

Held (allowing claimant's application; dismissing respondent's application):

- (1) CIPAA gives a claimant the right to proceed with the adjudication for a payment claim and 'payment' is defined in s. 4 of the CIPAA as 'a payment for work done or services rendered under the express terms of a construction contract.' Once the process of adjudication has been properly activated with the service of a notice of adjudication under s. 8(1) of the CIPAA on the respondent, the respondent could not skirt or stall the adjudication proceedings by saying that they do not agree to submit to adjudication. To allow them to do so would be to stymied the implementation of the CIPAA which in its long title is stated its avowed aim to 'facilitate regular and timely payment, to provide a mechanism

- A for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry'. A statutory right to an unpaid party cannot be denied or denuded by the non-paying party refusing to participate in the adjudication. Further, the consent of the respondent to the adjudication was not necessary, for otherwise all that a non-paying party needs to do is to refuse to consent and the whole scheme of statutory adjudication under the CIPAA would be frustrated. (paras 16, 17 & 33)
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- (2) The adjudicator appointed by KLRCA has only ten working days to indicate his acceptance and terms of his appointment, the default standard terms of appointment and standard fees make a lot of sense, saving time and energy as in a protracted negotiation over terms and fees of the adjudicator, not to mention the possible embarrassment that may ensue when a decision maker has to be involved in negotiating his fees with the parties. There was thus no merit in the allegations of the respondent that there was a breach of s. 23(2) of the CIPAA. Likewise, the respondent's allegation that s. 24 of the CIPAA had not been complied with by the said adjudicator was also not borne out by evidence. Section 24 states that the adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that there is no conflict of interest in respect of his appointment, that he shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense, that he shall comply with the principles of natural justice and there are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence. (paras 36 & 40)
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- (3) The CIPAA confers broad and vast powers on an adjudicator so that he may proceed with all speed and diligence in arriving at a decision within the tight time frame prescribed. Section 25(a) grants an adjudicator powers to establish the procedures in conducting the adjudication proceedings. There is nothing to say that the rules of natural justice is not satisfied if parties are not heard in person. So long as the parties are given the opportunity to be heard in writing, depending on the circumstances of the case, the court would not set aside an adjudication decision on grounds that the adjudicator did not allow an oral hearing to be had. There was no basis whatsoever for the allegations of a breach of natural justice in the conduct of the adjudication proceedings or that the conduct of the said adjudicator was such that he could not be said to have acted independently or impartially (paras 66 & 74)
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- H

Case(s) referred to:

- I *Balfour Beatty Construction Ltd v. Lambeth London Borough Council* [2002] EWHC 597 (TCC) (*refd*)
Harlow & Milner Ltd v. Mrs Linda Teasdale [2006] EWHC 1708 (*refd*)
Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC (*refd*)

R (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax [2001] EWCA Civ 329 (*refd*) A

WY Steel Construction Pte Ltd v. Osko Pte Ltd [2013] SGCA 32 (*refd*)

Legislation referred to:

Construction Industry Payment And Adjudication Regulations 2014, reg. 6
Construction Industry Payment and Adjudication Act 2012, ss. 4, 5, 6(4), 7, 8(1),
(2), 12(2)(b), 15(b), (d), 18(1), 19(1), (2), (4), 21(b)(i), 23(1), (2), 24, 25(a), (f),
(g), (j), (l), (p), 27(1), 29(3), 32(b), 37 B
Federal Constitution, art. 135(2)

(Originating Summons No: WA-24C-117-10-2016)

For the plaintiff - Patrick Dass; M/s Patrick Dass & Co

For the defendant - Nandakumar S Haridas; M/s J Nee C

(Originating Summons No: WA-24C-105-10-2016)

For the plaintiff - Nandakumar S Haridas; M/s J Nee

For the defendant - Patrick Dass; M/s Patrick Dass & Co

Reported by Sandra Gabriel D

JUDGMENT

Lee Swee Seng J:

[1] This is an application by Permintex JSK Resources Sdn Bhd (“Permintex”) to set aside an adjudication decision given on 15 July 2016. There was also a corresponding application by Follitile (M) Sdn Bhd (“Follitile”) to enforce the adjudication decision as if it is a judgment of the court. E

[2] Permintex was the non-paying party in the adjudication brought by Follitile as the unpaid party under the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”). In August 2015 Permintex had appointed Follitile as its subcontractor to supply labour to install aero foil inclusive of all necessary framing, sub-frames in respect of a construction project known as “Projek Mass Rapid Transit Lembah Kelang: Jajaran Sungai Buloh-Kajang Package S3; Construction and Completion of Elevated Stations and Other Associated Works at the Curve, One Utama and Taman Tun Dr Ismail.” F G

[3] Follitile said they were not paid for the works done and so demanded for payment. On 26 January 2016 Permintex made part payment of RM50,000. Follitile then proceeded to serve a payment claim on the Permintex pursuant to s. 5 CIPAA on 8 March 2016 for the balance sum of RM379,510.83. There was no payment response served by Permintex on the claimant pursuant to s. 6 of the CIPAA. Neither was there an adjudication response filed by Permintex. Their request for an extension of time to file the adjudication response was rejected by the adjudicator. The adjudicator had awarded a sum of RM262,018.62 (inclusive of GST) to the claimant based on Permintex’s admission of debt contained in its letter dated 1 April 2016. He also awarded interest and costs in favour of the claimant. H I

A [4] The parties shall be referred to by their names or sometimes by their designation in the adjudication as claimant for Follitile and respondent for Permintex. By consent both applications were heard together as the substratum of facts are the same for both the applications and in the event that the adjudication decision is not set aside, it will generally be enforced.

B **Prayers**

C [5] The respondent in the adjudication had applied to set aside the adjudication decision under s. 15(b) of the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”) on ground of denial of natural justice and also under s. 15(d) of the CIPAA on ground that the adjudicator had not acted independently or impartially.

Principles

D [6] As there was no payment response served on the unpaid party, Follitile, the non-paying party is deemed under s. 6(4) of the CIPAA to have disputed the entire payment claim. Follitile then as claimant initiated the adjudication proceedings by serving a written notice of adjudication dated 25 March 2016 on the respondent, Permintex, containing the requisite documents pursuant to s. 8(1) of the CIPAA.

E [7] Section 8(2) of the CIPAA provides that upon receipt of the respondent of the notice of adjudication, an adjudicator shall be appointed in the manner prescribed in s. 21. At para. 7 of the said notice of adjudication the claimant had proposed the name of an adjudicator and further had stated as follows:

F Please indicate your agreement on the proposed person to be appointed as adjudicator, or any other suitable person of your choice for our consideration. If we do not receive any response from you by 01.04.2016, we will proceed to make a request to the Director of the Kuala Lumpur Regional Centre for Arbitration to appoint an adjudicator pursuant to section 21(b)(i) of the Construction Industry Payment and Adjudication Act 2012.

G [8] As there was no response from the respondent on the proposed named adjudicator, the claimant wrote to the KLRCA by their letter of 19 April 2016 requesting their assistance to appoint an adjudicator pursuant to s. 21(b)(i) of the CIPAA. The whole of s. 21 of the CIPAA is reproduced below to show that under the circumstances of this case, s. 21(b)(i) is the applicable subsection to apply:

H 21. Appointment of Adjudicator

An adjudicator may be appointed in the following manner:

- I (a) By agreement of the parties in dispute within ten working days from the service of the notice of adjudication by the claimant; or
- (b) By the Director of the KLRCA
- (i) Upon the request of either party in dispute if there is no agreement of the parties under paragraph (a); or
- (ii) Upon the request of the parties in dispute.

[9] On 24 April 2016 the KLRCA wrote to the Mr Shannon Rajan to inform him of his appointment as an adjudicator for the dispute. The said adjudicator then wrote to the parties by his letter of 25 April 2016 and stated as follows: A

3. Pursuant to section 23(2) of CIPAA, I am required to propose and negotiate my terms of appointment including fees chargeable with the parties. I hereby enclose my proposed standard terms of appointment for your perusal. B

[10] The said adjudicator also requested for the parties' response by 6 May 2016 as he would have to revert back to KLRCA by 9 May 2016. On 5 May 2016 the claimant reverted and accepted the proposed terms. The respondent did not revert at all. However that does not prevent the adjudication from proceeding as reg. 6 of the Construction Industry Payment and Adjudication Regulations 2014 provides as follows: C

6. KLRCA's standard fees for services and expenses of adjudicator
The KLRCA's standard fees for the services and expenses of an adjudicator as specified in the Schedule shall apply if the parties in dispute and the adjudicator fail to agree on the terms of appointment and the fees of the adjudicator. D

[11] Likewise in s. 19(2) of the CIPAA it is provided as follows:

If the parties and the adjudicator fail to agree on the terms of appointment and the fees of the adjudicator, the KLRCA's standard terms of appointment and fees for Adjudicator's shall apply. E

[12] The said adjudicator by his letter of 9 May 2016 to both the claimant and respondent, sent by both email, registered post and fax, accepted his appointment as adjudicator by enclosing a copy of form 6 of the notice of acceptance of the appointment to Act as adjudicator as provided for in the KLRCA Adjudication Rules & Procedure. At para. 2 of the said notice is a declaration by the said adjudicator that he accepted the appointment to act as adjudicator as per the KLRCA's standard terms of appointment and fees for the services of an adjudicator in force as of the date of the said letter and a copy of said standard terms was attached. F G

[13] The said adjudicator also made the requisite declaration under s. 24 of the CIPAA at para. 4 of the said notice. He also at para. 6 of the said notice set out the adjudicator's fees payable and the KLRCA administrative fees as well as the 6% GST payment. He further gave directions for both parties to contribute and make deposit with KLRCA for the adjudicator's fees and expenses and the KLRCA's administrative fees and any taxes in equal share as security in advance within ten working days from the date of receipt of the said notice. H

[14] On 16 May 2016 Permintex's solicitors wrote to the KLRCA stating that they are not agreeable to the matter being referred to this adjudication proceeding and this matter be referred to the civil court for litigation and that they would not be paying the deposit requested. Another letter with the same contents was also sent to the solicitors for the claimant. I

- A [15] In *Harlow & Milner Ltd v. Mrs Linda Teasdale* [2006] EWHC 1708 at para. 16 it was held that “any party who was on the receiving end of the adjudicator’s decision could, if they wanted to avoid the result, commence arbitration proceedings against the successful party, and then argue that the adjudicator’s decision should abide the eventual outcome of that arbitration.
- B It was precisely to avoid such delaying tactics that the statutory adjudication process was created in the first place ...”

- C [16] It must be stated here that the CIPAA gives a claimant the right to proceed with adjudication for a payment claim and “payment” is defined in s. 4 of the CIPAA as “a payment for work done or services rendered under the express terms of a construction contract”. Once the process of adjudication has been properly activated with the service of a notice of adjudication under s. 8(1) of the CIPAA on the respondent, the respondent cannot skirt or stall the adjudication proceedings by saying that they do not agree to submit to adjudication. To allow them to do so would be to stymied the implementation of the CIPAA which in its long title is stated its avowed aim to “facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry”.
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- E [17] Such a statutory right to an unpaid party cannot be denied or denuded by the non-paying party refusing to participate in the adjudication. A party like the non-paying party would naturally prefer to delay the matter as long as possible for adjudication is a speedy process whereby it is meant to yield a result of interim finality which is enforceable as if it is a judgment of the court.

- F [18] Parliament had anticipated this obstacle that may be thrown at the unpaid party so as to derail adjudication and so under s. 37 of the CIPAA it is provided as follows:

37. Relationship Between Adjudication and Other Dispute Resolution Process

- G (1) A dispute in respect of payment under a construction contract **may be referred concurrently to adjudication, arbitration or the court.**
- (2) Subject to subsection (3), a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings.
- H (3) An adjudication proceeding is terminated if the dispute being adjudicated is settled by agreement in writing between the parties or decided by arbitration or the court. (emphasis added)

- I [19] Whilst there is nothing preventing the respondent from proceeding with litigation, there is equally nothing that would prevent the claimant from proceeding with adjudication. Surely a claimant’s reference of the dispute to adjudication cannot be dependent on whether the respondent is agreeable to adjudication. To give the respondent such a choice would be to allow the respondent to paralyse the purpose of CIPAA and to render it a toothless piece of legislation.

[20] The KLRCA replied the respondent's solicitors by its letter of 19 May 2016 stating that any issues relating to the dispute should be raised with the appointed adjudicator and the said letter was copied to both the adjudicator and the solicitors for the claimant. A

[21] The adjudicator wrote to the claimant's solicitors as well as the respondent's solicitors *via* his letter dated 23 May 2016, inviting the parties to make further submissions with regard the matters raised "by the end of the business day tomorrow ie, 24 May 2016". B

[22] The matters raised were with respect to the respondent's solicitors' letter to KLRCA stating that the respondent was not agreeable to the matter being referred to adjudication and that the matter should be litigated in the civil courts. C

[23] The claimant's solicitors replied by their letter of 24 May 2016 stating that their client was exercising their statutory right under s. 7 of the CIPAA and that the answer to the respondent's objection can be found in s. 37 of the CIPAA that allows for concurrent proceedings in adjudication as well as in adjudication. D

[24] The respondent's solicitors, Messrs Patrick Dass & Co, on the other hand, replied *via* letter dated 23 May 2016 to the adjudicator's letter dated 23 May 2016 stating that they could not comply with the deadline which they submitted was ridiculously short, as their Mr Dass had a trial in Temerloh court from 24 May 2016 to 26 May 2016. E

[25] By the same letter the respondent's solicitors had requested for the evidence of Mr Shannon Raj's appointment as the adjudicator and also asked under what authority he had requested for submissions to be made. The relevant paragraphs of the said letter reads: F

In any event, our client instructs us that they have not consented to refer the matter for adjudication or your appointment as adjudicator. Kindly let us have evidence of the same. F

[26] The adjudicator in his letter dated 25 May 2016 replied as follows: G

I have considered the submissions and arguments from both parties and I have reached the conclusion that this adjudication proceeding has been validly instituted by the Claimant and that I have been properly appointed as an adjudicator by the KLRCA pursuant to the Construction Industry Payment and Adjudication Act 2012 (CIPAA). I direct the parties to comply with the procedures and timelines set out under CIPAA. G

[27] Apparently counsel for the respondent was not satisfied that the said adjudicator had been duly appointed by KLRCA and insisted that he must produce evidence of his appointment. The KLRCA had earlier written to the said adjudicator on his appointment by their letter of 25 April 2016 which letter was copied to both the solicitors for the claimant as well as to Permintex by both fax, email as well as by courier. The KLRCA had also attached to the said letter the letter of acceptance of the said adjudicator. That is sufficient compliance with s. 23(1) by the Director of KLRCA. Section 23(1) of the CIPAA reads: H
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- A The Director of the KLRCA shall appoint an adjudicator under paragraph 21(b) within five working days upon receipt of a request and shall notify the parties and the adjudicator in writing.
- B [28] If the respondent's solicitors were under the preconceived notion that their consent is necessary for the appointment of the said adjudicator, then such a notion is misconceived. This was a clear case where the parties could not agree on the appointment of an adjudicator and what more when the respondent would not even agree to adjudication and would have no participation in its proceedings as they insisted that the matter should proceed to litigation.
- C [29] Even with respect to arbitration, the respondent had not proceeded to issue any notice to arbitrate on the claimant.
- D [30] As for the authority to ask for submission that comes under the vast powers given to an adjudicator under s. 25 of the CIPAA. He has the power, under s. 25(a), to establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties. Under s. 25(j) he shall have the powers to issue any direction as may be necessary or expedient.
- E [31] Since the reason given by the respondent for not submitting to adjudication was merely that they have not consented to it, there was no necessity for the adjudicator to reply more than what he had done. There is also no basis for the respondent to then conclude that by so responding in the adjudicator's reply, the adjudicator had demonstrated his biasness in favour of the claimant. To be fair to the adjudicator he did not completely shut off the respondent for in his order for direction No. 2 dated 25 May 2016 at para. 4 thereof he wrote:
- F 4. The Respondent is at liberty to raise further submissions in respect of its position contained in its letters dated 16.05.2016 and 23.05.2016 in the Adjudication Response for my consideration.
- G [32] Counsel for the respondent submitted that under s. 19(1) of the CIPAA the parties and the adjudicator shall be free to agree on the terms of appointment of the adjudicator and the fees to be paid to the adjudicator. The submission is that the respondent had never agreed to the adjudicator's appointment and the fees to be paid to him. The respondent alleged that the requirement of this section appeared to have been bypassed by the adjudicator.
- H [33] As pointed out the consent of the respondent to the adjudication is not necessary, for otherwise all that a non-paying party needs to do is to refuse to consent and the whole scheme of statutory adjudication under the CIPAA would be frustrated. As for the non-agreement on fees, s. 19(2) of the CIPAA provides that if the parties and the adjudicator fail to agree on the terms of appointment and the fees of the adjudicator, the KLRCA's standard terms of appointment and fees for adjudicators shall apply.
- I

[34] It makes tremendous sense for the KLRCA, as the adjudication authority under the CIPAA as provided for in s. 32 thereof to be responsible under s. 32(b) for the determination of the standard terms of appointment of an adjudicator and fees for the services of an adjudicator. This the KLRCA had done with the schedule under reg. 6 of the Construction Industry Payment And Adjudication Regulations 2014 which is the KLRCA's Standard Fees for Services and Expenses of Adjudicator.

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[35] The KLRCA standard terms of appointment is found in Schedule II of the KLRCA Adjudication Rules & Procedure.

[36] It does away with the hassle of haggling over terms of appointment and fees and the abuse that may come with it in the non-paying party's reluctance to participate in the adjudication proceedings by refusing to agree on the terms of appointment of the adjudicator or his fees or both. Bearing in mind that the adjudicator appointed by KLRCA has only ten working days to indicate his acceptance and terms of his appointment, the default standard terms of appointment and standard fees make a lot of sense, saving time and energy as in a protracted negotiation over terms and fees of the adjudicator, not to mention the possible embarrassment that may ensue when a decision maker has to be involved in negotiating his fees with the parties. There is thus absolutely no merits in the allegations of counsel for the respondent that there was a breach of s. 23(2) of the CIPAA in that there was no negotiation on his terms of appointment nor his fees.

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[37] Counsel for the respondent submitted that s. 19(4) of the CIPAA has not been complied with by the said adjudicator in that the respondent has not received any direction from the adjudicator on how much fees they should deposit with KLRCA. Again that is not just contradictory to the stand that they have taken but also that the evidence show otherwise. The notice of acceptance of the appointment to Act as adjudicator was sent by the adjudicator to the respondent by registered post, fax and email and paras. 6 and 7 read as follows:

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6. The fees will be based on KLRCA's Standard Fees for Services and Expenses of Adjudicator which is set out below:

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Adjudicator's fees. : RM11,995.72

KLRCA Administrative Fees : RM2,399.14

Total. : RM14,394.86

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Add 6% GST. : RM863.69

Total Fees RM15,258.55

7. I further direct the parties to contribute and deposit with the

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Director of the KLRCA a sum of RM15,258.55 representing a reasonable proportion of the adjudicator's fees and expenses, the KLRCA's administrative fee and any taxes as may be imposed by the Government, in equal share as security in advance within 10 working days from the date of receipt of this notice.

- A [38] Thereafter KLRCA had written to both the claimant and the respondent with its invoice seeking the payment of RM7,629.28 from each of the, by its letter of 11 May 2016 pursuant to s. 19(4) of the CIPAA.
- B [39] The respondent cannot now feign ignorance. Perhaps it was a case of forgetfulness, floundering on fickleness, for the respondent had, by their letter of 16 May 2016 taken the stand that they would not agree to the adjudication and neither would they be depositing the fees requested by KLRCA.
- C [40] Likewise the respondent's allegation that s. 24 of the CIPAA had not been complied with by the said adjudicator is also not borne out by the evidence. Section 24 states that the adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that there is no conflict of interest in respect of his appointment, that he shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense, that he shall comply with the principles of natural justice and there are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence. The said adjudicator had declared this in the form 6 which he had sent to the respondent by his letter dated 9 May 2016 by way of registered post, fax and email. Perhaps it is a case where the respondent had not handed over to their solicitors all the documents that they had received from both the adjudicator and KLRCA.
- E [41] The respondent took umbrage with the said adjudicator over his letter to the claimant's solicitors, Messrs Mar & Co, dated 7 June 2016, when the adjudicator wrote directing that the claimant do pay on the respondent's behalf the remaining portion of the advance security deposit of RM7,692.29 to the director of KLRCA.
- F [42] Counsel for the respondent, Mr Patrick Dass, alleged quite audaciously, that this request that the claimant do pay the full security deposit (which substantially is the adjudicator's fee) and the claimant gladly paying it on 13 June 2016 gives rise to the probability of the adjudicator being biased in favour of the claimant, bearing in mind that the respondent was, after all, still disputing the adjudicator's authority to act as adjudicator.
- G This, it was argued by counsel, put the said adjudicator in a position of conflict of interest.
- H [43] I must be forgiven for not been able to follow the flow of argument of counsel for the respondent.
- [44] Rule 9(4) of the KLRCA Adjudication Rules & Procedure states as follows:
- I If any parties fails to make payment within the time ordered by the adjudicator, the adjudicator shall within seven (7) days thereafter issue such direction as he thinks fit including inviting another party or parties to make such payment and notify the Director of the KLRCA accordingly.

[45] The adjudicator's said letter to Messrs Mar & Co dated 7 June 2016 was copied to the director of KLRCA and Messrs Patrick Dass & Co by hand, post and fax.

A

[46] Rule 9(4) both empowers and enjoins the adjudicator to so proceed when there is default in one party to pay its portion of the fees and expenses of the adjudicator and of the adjudication. Otherwise a party who is not interested to participate in the adjudication can simply and surreptitiously stall the adjudication by refusing to pay the costs of adjudication. I can neither understand nor appreciate how an adjudicator in exercising his powers as allowed under r. 9(4) can be said to be bias in favour of the party that has complied with his directions.

B

C

[47] Even if it be true that such a payment by the claimant of the respondent's portion of its fees would inspire biasness on the part of the adjudicator in favour of the claimant, the respondent can avoid that fear of biasness, by paying his portion of the fees and charges as required under s. 19(4) of the CIPAA.

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[48] The respondent's argument becomes more ludicrous when its counsel took the view that r. 9(4) contravenes s. 19(4) of the CIPAA which states that both parties shall contribute and deposit with the director of KLRCA a reasonable proportion of the fees in equal shares. In effect counsel is taking the position that if the respondent does not pay its portion of the fees then the adjudicator should not proceed with the adjudication. It is rather illogical for the respondent to assert that it must be allowed to pay its portion of the fees and then in the next breath assert that if it does not so pay, the adjudicator has no right to call on the claimant to pay.

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[49] To allow that to happen would be to allow the purpose of the CIPAA to be frustrated by defaulting non-paying parties who have every reason to stall an adjudication so as not to have to make payment of an adjudicated sum, knowing full well that arbitration or litigation would take time.

[50] Little wonder that counsel for the respondent further submitted that the said adjudicator had no right to proceed with the adjudication proceedings until the issue of his appointment and payment of his fees are determined according to the rules of natural justice.

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[51] It cannot be said that the claimant gladly paid the respondent's portion of his contribution to the fees. No one would want to be out of pocket more than is necessary. The claimant had no choice for if it does not pay then r. 9(5) would apply for it reads:

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In the event full payment of the fees and expenses, including the KLRCA's administrative fee and any taxes as may be imposed by the Government, are not deposited with the Director of the KLRCA under Section 19(5) of the Act, the adjudicator shall not release the adjudication decision to the parties.

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A [52] If there is any comfort it is that at the end of the day there is some hope of recouping the fees so advanced if the claimant should succeed in its payment claim. Section 18(1) of the CIPAA provides as follows:

B The adjudicator in making the adjudication decision in relation to costs of the adjudication proceedings shall order the costs to follow the event and shall fix the quantum of costs to be paid.

C [53] It is not correct to say that the adjudicator must resolve the issue of his appointment before he could proceed with the adjudication. Where a challenge to the appointment of an adjudicator is concerned, s. 29(3) of the CIPAA expressly authorised the adjudicator to proceed and complete the adjudication. It reads:

D Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

E [54] On 16 June 2016, the respondent's solicitors wrote to the said adjudicator requesting for an extension of time to put in the respondent's adjudication response. The application was made pursuant to s. 25 of the CIPAA. Under s. 25(p) the adjudicator has the power to extend any time limit imposed on the parties under CIPAA as may be reasonably required. The claimant objected to the request by their letter of 17 June 2016. The claimant pointed out that the last day to file the adjudication response was 6 June 2016, ie, ten working days from 23 May 2016, the date the claimant's adjudication claim was received by the respondent. The claimant's solicitors further stated at para. 19 of their letter of 17 June 2016 as follows:

G 19. The Respondent's request for an extension of time (EOT) today 17.6.2016 (after 11 days from 06.06.2016) will not only prejudice the Claimant's interest and fairness under CIPAA as the Claimant had at all material times, complied with the procedures, timelines, directions as requested by CIPAA and the Adjudicator but also delay the Adjudication Decision on this matter, pursuant to section 12(2)(b) of CIPAA.

[55] Section 12(2)(b) of the CIPAA provides as follows:

H Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within:

...

(b) Forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received;

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[56] On the next day, *via* his letter dated 17 June 2016, the respondent's learned counsel said that the adjudicator promptly and flatly rejected the request, without asking parties to submit further on the law.

[57] Counsel for the respondent further argued that even in a court of law, the respondent would be allowed to make submissions, but the said adjudicator chose to give a decision without hearing submissions on law. He argued that there was no prejudice to the proceedings or to the claimant by granting an extension of time. It was argued that there was still ample time to adjudicate and deliver his decision. Counsel for the respondent castigated the adjudicator's decision as having deprived the respondent of the opportunity to be heard and to present their case. It was further submitted that his decision given without hearing the respondent on arguments of law showed that he was biased in favour of the claimant.

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[58] I agree with counsel for the claimant, Mr Nandakumar, that the adjudicator was perfectly entitled to dismiss the respondent's application under s. 25 of the CIPAA as the application was made only after the deadline for filing the adjudication response had expired and that ample time had been given for them to so file their adjudication response. The only reason given was that the respondent was still looking for certain documents required to respond to the claim.

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[59] I cannot fault the exercise of discretion on the part of the adjudicator. The adjudicator had given cogent reasons for dismissing the application for an extension of time to file the adjudication response in its letter of 17 June 2016 to parties' respective solicitors as follows:

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4. I am of the view that there was ample time given for the Respondent to examine the Adjudication Claim and prepare its Adjudication Response within the prescribed time under CIPAA or at the very least make its EOT Application before the expiry of the time limited under CIPAA to file the Adjudication Response or within a reasonable time thereafter. I note that the EOT Application was only made after a lapse of 7 working days from the filing deadline of the Adjudication Response. This delay is significant under the framework of CIPAA.

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5. I further find that the Respondent's reason for an EOT that it "is still looking for certain documents required to respond to the claim" is grossly inadequate to explain the delay in making an EOT Application within reasonable time. I agree with the Claimant's submissions that the Respondent was afforded every opportunity to comply with the provisions of CIPAA but the Respondent had clearly not done so.

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[60] At any rate the respondent had not shown how the decision could well have been different had the relevant documents it had been looking for had been allowed to have been served out of time in the adjudication response or that the discretion would have been exercised differently had the adjudicator had allowed for submission of law.

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[61] In this respect on the issue of natural justice and fairness rule, Humphrey Lloyd J in *Balfour Beatty Construction Ltd v. Lambeth London Borough Council* [2002] EWHC 597 (TCC), had this advice for us:

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A 29. Nevertheless, in my judgment, ... in determining whether a party has
been treated fairly *or in determining whether the adjudicator has acted*
impartially, it is very necessary to bear in mind that the point or issue which is to
be brought to the attention of the parties must be one of which is either decisive or
of considerable potential importance to the outcome and not peripheral or irrelevant.
B It is now clear that the construction industry regards adjudication not
simply as a staging post towards the final resolution of the dispute in
arbitration or litigation but as having in itself considerable weight and
impact that in practice goes beyond the legal requirement that the decision
has for the time being to be observed. Lack of impartiality or of fairness
C in adjudication must be considered in that light. It has become all the
more necessary that, within the rough nature of the process, decisions are
still made in a basically fair manner so that the system itself continues to
enjoy the confidence it now has apparently earned. The provisional nature
of the decision also justifies ignoring non-material breaches. Such errors,
if apparent (as they usually are), will be rectified in any negotiation and
D settlement based upon the decision. The consequence of material issues
and points is that the dispute referred to adjudication will not have been
resolved satisfactorily by any fundamental standard and the chances of
it providing the basis for a settlement are much less and the chances of
it proceeding to arbitration or litigation are much greater however the time
limits, the nature of the process and the ultimately non-binding nature of
the decision, all mean that the standard required in practice is not that
E which is expected of an arbitrator. Adjudication is closer to arbitration
than an expert determination but it is not the same. (emphasis added)

[62] Yet another complaint that there has been a breach of natural justice
was that the adjudicator had not even cared to invite parties for a meeting,
to clarify pending issues, to explain the procedure, the timelines, how he
F would be conducting the proceedings, and to give guidance or directions or
to extend any time limit imposed on the parties under CIPAA as may be
reasonably required – all of which comes under an adjudicator's powers
under s. 25 of the CIPAA. Instead, it was argued rather seriously and
strenuously that he had preferred to take a “short cut” method of
G corresponding *via* emails and letters. It was highlighted that the parties had
not even met him. Learned counsel for the Respondent continued his
ramblings of discontent as follows:

H How would the Plaintiff even know that the alleged Mr. Shannon Raj
was the Mr. Shannon Raj that he claimed to be? Would it not be fair or
courteous for Mr. Raj to at least introduce himself to the parties before
starting the adjudication proceedings? After all, he would be paid by them.
Parties should at least know the person they are addressing instead of
addressing a ‘virtual person’.

I [63] The adjudicator had in the notice of acceptance of the appointment to
Act as adjudicator in the prescribed Form 6 under the KLRCA Adjudication
Rules & Procedure stated the “mode of service: by fax, email & post.” The
solicitors for the respondent had also communicated with the said adjudicator
via fax, post and email. It is too late in the day to complain of the mode of

correspondence between the parties and the adjudicator when all along during the proceedings, no objection had been raised and indeed parties have followed the said mode of service of documents.

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[64] The respondent submitted that the CIPAA 2012 does not expressly allow the adjudicator to conduct proceedings *via* correspondences, concealed from sight, without hearing the parties or their counsel in person. It was further argued by way of analogy that even a court of law requires parties to appear before it for case management and for trial.

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[65] The respondent had via their solicitors' letter dated 21 June 2016 highlighted all the matters raised above, complaining that the said adjudicator had acted in a high handed, arbitrary manner, showing biasness in favour of the claimant and requesting that in the interest of justice and fairness, he immediately should withdraw himself from adjudicating the matter. It was further submitted by the respondent that the adjudicator's silence is deafening.

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[66] The CIPAA confers broad and vast powers on an adjudicator so that he may proceed with all speed and diligence in arriving at a decision within the tight time frame prescribed. Section 25(a) grants him powers to establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties. If any party so feel strongly that he should hear witnesses or that a meeting should be called to address certain issues, then that party can always write in to ask him to exercise his powers under s. 25(f) with respect to calling meetings with the parties or under s. 25(g) to conduct any hearing or under s. 25(l) with respect to ordering that any evidence be given on oath. The adjudicator had issued a total of four orders for directions to the parties. There is nothing to say that the rules of natural justice is not satisfied if parties are not heard in person. So long as the parties are given the opportunity to be heard in writing, depending on the circumstances of the case, this court would not set aside an adjudication decision on ground that the adjudicator did not allow an oral hearing to be had. In fact natural justice does not necessarily mean the decision-maker has to meet the parties face to face - "Natural justice does not generally demand orality". See *R (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax* [2001] EWCA Civ 329, [2002] 2 WLR 255 at 286, para. 47, CA (England & Wales) where it was held as follows:

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The submission that a taxpayer or adviser at risk of compulsory disclosure of confidential documents ought to have an opportunity of deflecting the application is at first sight attractive. To see why, one need go no further than Lord Loreburn LC's celebrated remark in *Board of Education v. Rice* [1911] AC 179 that acting in good faith and listening fairly to both sides "is a duty lying upon everyone who decides anything". But in the same passage Lord Loreburn made clear, as other judges of high authority have done many times since, that how this is done is in principle a matter for each decision-maker: natural justice does not generally demand orality. And there is a further, small, group of cases, of which Mr Brennan submits this is one, in which the exigencies of the legislative scheme make an *inter partes* procedure impossible.

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A [67] Even in our country in the context of dismissal of a police officer and the right to be heard under art. 135(2) of the Federal Constitution, it does not mean that there must always be an oral hearing before the dismissal. Article 135(2) reads:

B No member of such a service shall be dismissed without being given a reasonable opportunity of being heard.

[68] In a case where the dismissed officer does not request for an oral hearing, he cannot later be heard to complain. The Federal Court in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; [2012] 3 MLJ 149 at p. 593 (CLJ); p. 162 (MLJ), held as follows with respect oral hearing and natural justice:

C [24] In the instant appeal the plaintiff sought a declaration that his dismissal from the police force is unlawful, null and void and of no effect and that he is still an inspector and entitled to all the salaries, emoluments and benefits due. The trial judge ruled that due to the nature of the disciplinary charges preferred against the plaintiff, the disciplinary authority should have held an oral inquiry and that their failure to do so is a breach of the rules of natural justice. As discussed earlier, the Court of Appeal dismissed the appeal by the defendants.

D [25] In *Utra Badi* this court held that the right to be heard given by art. 135(2) of the Federal Constitution does not require that the member of the service facing the disciplinary charge be given an oral hearing and it could not be argued that the failure to give that person an oral hearing was a denial of justice.

[26] In *Vickneswary*, this court held as follows:

F (i) from the provisions of the general orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the respondent, ie, the member of service facing the disciplinary charge to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it;

G (ii) it is clear from the facts that the respondent was given an opportunity to be heard whereby he had given a lengthy written representation explaining in detail his innocence; and

H (iii) it is not the court, but the disciplinary authority which has to decide the question of whether the respondent had exculpated himself by his written representation.

I [27] I dare say that the law is settled in cases of this genre. This can be gleaned from several decisions which were decided prior to *Utra Badi* and *Vickneswary*, see *Hjh Halimatussaadiyah bte Hj Kamaruddin v. Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61, *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114, *Zainal bin Hashim v. Government of Malaysia* [1979] 2 MLJ 276 and *Najar Singh v. Government of Malaysia & Anor* [1974] 1 MLJ 138.

[28] From the authorities referred to above I am of the view that the law is settled. Thus, an oral hearing may be given in instances where the disciplinary authority considers that the case against the officer requires further clarification and consequently appoint a Committee of Inquiry pursuant to general order 26(5) of the GO (Chapter D). If the disciplinary authority considers that no further clarification is required, I do not think that the officer concerned can insist or demand that a Committee of Inquiry be appointed.

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[69] Here there was no payment response filed and no adjudication response filed. There was an open letter dated 1 April 2016 from the respondent to the claimant way after the deadline for the respondent to serve a payment response. The payment response is to be served within ten working days of receipt of the payment claim on 8 March 2016. In that letter the respondent stated categorically as follows:

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Herewith are the status of the said claim taking into consideration after verification and payment made earlier:

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Amount Claim : RM379,510.83

Amount after verified : RM 297,187.38

Payment on 19/1/16 : RM 50,000.00

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Balance : RM247,187.38 (excluding GST)

[70] Though in the same letter the respondent did raise the issue of deductions and back-charges, these were not properly before the adjudicator in the form of a payment response. The adjudicator's jurisdiction is confined by s. 27(1) of the CIPAA to the matters raised in the payment claim in s. 5 and in the payment response in s. 6. As there is no payment response the respondent is deemed under s. 6(4) of the CIPAA to have disputed the whole of the payment claim. The respondent may still dispute the whole of the payment claim by responding to the matters raised by the claimant in its adjudication claim by the respondent serving its adjudication response on time. This the respondent also had failed to do. There was also no submissions filed by counsel for the respondent as directed by the adjudicator via his order for Directions No. 4 dated 8 June 2016 where he had set 17 June 2016 as the date by which submissions were to be filed and further submissions on costs shall be submitted by 24 June 2016. The respondent did not request for an oral hearing.

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[71] In the circumstances, it is within the exercise of the broad discretion of the adjudicator to conduct a documents-only adjudication without the need to hear oral evidence.

[72] I recall the decision of the Court of Appeal Singapore in *WY Steel Construction Pte Ltd v. Osko Pte Ltd* [2013] SGCA 32 where Justice Sundaresh Menon CJ, with respect to compliance by the adjudicator of the rules of natural justice, had this to say:

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- A 40 In our view, none of these provisions either individually or collectively permit an adjudicator to ignore s. 15(3). Section 16 sets out generally the rules relating to the commencement of adjudication and the adjudication process. Under s. 16(3)(c), an adjudicator must comply with the principles of natural justice; these must include the duty to give the parties adequate notice and an opportunity to be heard. However, these rules are always
- B contextual. We have already discussed the centrality of the concept of temporary finality to the adjudication scheme under the Act. A respondent is given a chance to respond to a payment claim by producing, first, a payment response and then (if the claimant proceeds to apply for adjudication of his payment claim) an adjudication response. *If he fails to provide a payment response and if, as a result, the adjudicator is mandated not to consider material that he seeks to introduce later, he has not been denied his right and opportunity to be heard. Rather, he has simply chosen not to exercise it and the rules of natural justice cannot then be called in aid.* Simply put, in such a
- C scenario, the respondent has had his opportunity, for the purposes of the hearing that culminates in the provisional ruling that has temporary finality, to make his case and he has failed to take that opportunity. (emphasis added)
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[73] The litany of complaints are baseless and frivolous and to reply the caustic letter of the respondent's solicitors of 21 June 2016 would be to descend into the arena of dispute which the adjudicator wisely restrained himself.

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- [74] There is no basis whatsoever for the allegations of a breach of natural justice in the conduct of the adjudication proceedings or that the conduct of the said adjudicator was such that he could not be said to have acted independently or impartially.

F **Pronouncement**

- [75] The application of the respondent to set aside the adjudication decision is singularly devoid of merits and so I had dismissed the said application with costs of RM10,000 to the claimant. I had correspondingly allowed the claimant to enforce the adjudication decision as if it is a judgment of the court with costs of RM5,000 to the claimant.
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